Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1442

AKERS MOTOR LINES, INC., OF DELAWARE,
AKERS MOTOR LINES, INC., OF NORTH CAROLINA,
CENTRAL MOTOR LINES, INC., and
NORTHERN FREIGHT LINES, INC.

v.

INTERSTATE COMMERCE COMMISSION
and
UNITED STATES OF AMERICA.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit on Behalf of Intervening Respondents, Bowman Transportation, Inc., Carolina Freight Carriers Corp., Pilot Freight Carriers, Inc., McLean Trucking Company, Mercury Motor Express, Inc., Thurston Motor Lines, Inc. and Johnson Motor Lines, Inc.

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Come now BOWMAN TRANSPORTATION, INC., CAROLINA FREIGHT CARRIERS CORP., PILOT FREIGHT CARRIERS, INC., McLEAN TRUCKING COMPANY, MERCURY MOTOR EXPRESS, INC., THURSTON MOTOR LINES, INC., and JOHNSON MOTOR LINES, INC. (the intervening respondents) and submit this their brief in opposition to a petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed in this case by petitioner April 10, 1978.

QUESTION PRESENTED

Should This Court Review a Court of Appeals Decision Finding a Petition for Review Untimely Under 28 U.S.C.A. Section 2344 and, Additionally, Finding No Abuse of Interstate Commerce Commission Discretion in Refusing to Reopen an Administratively Final Proceeding?

STATEMENT

The intervening respondents are motor common carriers operating under certificates of public convenience and necessity issued by the Interstate Commerce Commission who appeared as protestants opposing applications filed by petitioners under Section 5 of the Interstate Commerce Act for approval of the transfer of control of certificates of public convenience and necessity held by petitioners. The framework of the applications as opposed by these intervening respondents was as follows. Akers of Delaware, the holding company for Akers of North Carolina, sought to acquire control of Central and its subsidiary Northern through the purchase of all outstanding stock in Central. The certificates of Akers North Carolina and Central included substantial duplication. As part of a proposal to eliminate this duplication, an application was filed with the Commission for approval of a transfer of certain duplicating certificates of Central and Northern to Transcon, another carrier. Intervening respondents opposed not only the Akers' acquisition of Central, but also the transfer of the Central and Northern certificates to Transcon.

On oral hearing held before an Administrative Law Judge of the Commission, after the introduction of some evidence, an agreement was reached for certain stipulations to be entered which would allow intervening respondents to withdraw their

opposition to the applications. Transcon agreed to accept a restriction in the Central certificates which would limit their use to transcontinental operations between points west of the Mississippi River, on the one hand, and, on the other, points authorized by the certificates east of the Mississippi River. The certificates only authorized service east of the Mississippi, however, Transcon's certificates would allow joinder to serve points west of the Mississippi. Akers Delaware agreed to accept a price reduction from Transcon based upon the diminished utility of the certificates. Akers passed this price reduction on to the stockholders of Central as a reduction in the purchase price for the stock. The contracts between the various parties were amended and stipulations were entered in the record.

The Administrative Law Judge issued a decision incorporating the stipulations stating the authority to be transferred to Transcon, the authority to be retained by Central and Northern, and approved both transfers, i.e., purchase of the Central stock by Akers Delaware and purchase of the Central and Northern rights by Transcon. No administrative appeal was taken from the initial decision of the Administrative Law Judge which became the decision of the Commission on June 11, 1976. Both transactions were consummated. Both the 30-day administrative appeal time and the 60-day judicial appeal time passed.

Petitioners then filed a letter petition with the Commission asserting for the first time that the initial decision was incorrect in setting out the authority to be retained by Central and Northern and requesting the Commission to reissue the certificates to Central which had been sold to Transcon imposing a restriction on these certificates allowing them to be used only east of the Mississippi. The Commission issued an order finding that the petitioners had offered no explanation for delay beyond the appropriate time for filing such a petition and that no good cause had been shown for granting the petition. Petitioners filed a Petition for Reconsideration with respect to this

order. That Petition was denied by the Commission. The petitioners filed a petition for a finding that an issue of general transportation importance is involved which the Commission denied. Petitioners then instituted a petition for review of the Commission's orders in the United States Court of Appeals for the Fourth Circuit. Motions to dismiss the petition were filed and carried with the case. Briefs were submitted and the Court of Appeals issued a decision dismissing the petition based upon dual reasoning. The Court of Appeals found that petitioners had failed to file a timely petition for review under 28 U.S.C. Sec. 2344 within 60 days after the entry of the June 11, 1976 order. *Provisioners Frozen Express, Inc. v. ICC*, 536 F.2d 1303, 1305 (9th Cir., 1976); *Microwave Comm., Inc. v. FCC*, 515 F.2d 385, 388-89 (D.C. Cir., 1974). Additionally, the Court found that the Commission had not abused its discretion in denying those petitions filed after the administrative finality of the Commission's order and the running of the time for appeal of that order under 28 U.S.C. Sec. 2344. Thus, based upon the jurisdictional time for filing and the merits, the Court dismissed the Petition for Review.

REASONS FOR DENYING THE WRIT

I. The Petition for Certiorari Raises No Significant Statutory or Policy Considerations Warranting Review by This Court.

(A) The decision below is responsible judicial review, procedurally, and upon the merits, of agency action based upon substantial evidence and not shown to be arbitrary or capricious.

Contrary to petitioners' assertion, the Court of Appeals' decision does not isolate from court review any activity of the Interstate Commerce Commission. The decision could never be used as precedent precluding a *diligent* party to an administrative proceeding from judicial review of administrative action. Petitioners are not in a position to speak on behalf of *diligent* parties to administrative action. Petitioners did not even seek reopening of the administrative proceeding until beyond the 60-day period for the filing of a petition for judicial review. Petitioners have consummated transactions approved by the Interstate Commerce Commission, accepting the benefits to them allowed by that action prior to asserting error in the administrative orders. Further, as found in the *Provisioners* case, *supra*, even non-diligent parties such as petitioners have a right to a finding that an administrative agency's refusal to reopen an administratively final proceeding is not an abuse of administration discretion.

Petitioners have no citations of case law which are in any way inconsistent with the decision of the Fourth Circuit. In *American Farm Lines v. Black Ball Freight*, 397 U.S. 532 (1970), Justice Douglas' opinion clearly rebuts the argument made bv petitioners that there may be an unreviewable substantive administrative action. The point made by Mr. Justice Douglas in that case is that the Commission may accept petitions for rehearing or reopening even during the pendency of allowable judicial review. Of course, the Hobbs Act, 28 U.S.C. Section 2344, was

not applicable to judicial review of Interstate Commission orders at that time. The decision cannot be read to allow judicial review of an administratively final order beyond the 60-day period when there is no reopening by the Commission of that action.

Tallman v. Udall, 324 F.2d 411 (D.C. Cir., 1963) also deals with a different statute of limitations, 30 U.S.C. Sec. 226-2. In that case, one of the three judges sitting held that a petition filed by the petitioner requesting an exercise of supervisory authority by the Secretary of Interior would extend the time for judicial review of a subordinate's action where such a petition was a long-standing practice and there was no other administrative appeal from the subordinate's decision. The other two Judges concurred with the result of the decision but would not have considered the statute of limitations issue on the merits.

In *Monship Lines, Limited v. Federal Maritime Board*, 295 F.2d 224 (D.C.Cir., 1961), the Court allowed petitions for review of administrative action stating that the time for the running of the statute of limitations began on a ruling on the merits in response to a Petition for Rehearing. The Court stated that the Petition for Rehearing was allowed by the Agency's rules, accepted though filed late and considered on the merits. Under the circumstances, the Court held that the Agency could waive its own administrative rules for filing petitions for rehearing but *could not waive* a limitation period fixed by Congress. There is clearly no waiver in the Interstate Commerce Commission's orders ruling on petitioner's post finality pleadings in the instant case.

The case of *B. J. McAdams v. Interstate Commerce Commission*, 551 F.2d 1112 (8th Cir., 1977) is certainly not inconsistent in any way with the case of *Provisioners Frozen Express, Inc. v. Interstate Commerce Commission*, 536 F.2d 1303 (9th Cir., 1976). In fact, in *B. J. McAdams, supra*, footnote 2 to the decision takes a paragraph to distinguish the *Provisioners* case factually.

(B) The decision of the Interstate Commerce Commission on the merits, judicial review, and further administrative actions are not mutually exclusive.

As a policy matter, petitioners argue that the decision of the Court of Appeals would prematurely involve courts in matters committed to Agency discretion. The whole thrust of Mr. Justice Douglas' opinion in *American Farm Lines, supra*, is that there should be no indivisible jurisdiction which must rest with the Court or the Commission unless there is some statutory provision to this effect.

Both the Commission and the Court ruled upon the merits of petitioner's post-finality arguments. The equities in the factual situation do not lie with petitioners. Petitioners seek to withdraw from stipulations entered with full knowledge of all facts and incorporated into the Commission action. When stipulated restrictions are accepted by an administrative law judge and relied upon by withdrawal of protestants, the Courts should uphold these restrictions. See, *Georgia-Florida-Alabama Transportation Company v. United States*, 290 F.Supp. 764 (M.D. Ala., 1968). Petitioners have been less than fully honest in presenting their arguments to the Commission and the Court as pointed out at each stage of the proceeding by these intervening respondents. Petitioners are still engaged in requesting the same relief sought in its Petition for Review to the Court of Appeals from the Commission simultaneously with this Petition, inconsistent with petitioners' policy arguments.

CONCLUSION

Intervening respondents respectfully submit there is no basis for grant of the writ sought. The Petition should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that pursuant to Rule 33 of the Supreme Court of the United States, I have served two copies of the foregoing Brief upon all attorneys of record by first class mail, postage prepaid, to the addresses shown by them in pleadings filed, as follows:

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